Filed 2/17/09 P. v. Venegas CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EDDIE VENEGAS, Defendant and Appellant.	B204613 (Los Angeles County Super. Ct. No. BA318981)
In re EDDIE VENEGAS, on Habeas Corpus.	B207667

APPEAL from a judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed.

PETITION for Writ of Habeas Corpus. Writ denied.

Alex N. Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Eddie Venegas, appeals from the judgment entered following his conviction, by jury trial, for assault with a firearm upon a peace officer (two counts) and robbery, with firearm, prior serious felony conviction and prior prison term enhancements (Pen. Code, §§ 245, subd. (d)(1), 211, 12022.5, 12022.53, 667, subd. (b)-(i), 667.5).[1] Venegas was sentenced to state prison for a term of 19 years. He also filed an accompanying petition for writ of habeas corpus.

The judgment is affirmed; the petition for writ of habeas corpus is denied.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), we find the evidence established the following.

1. *Prosecution evidence.*

On March 5, 2007,[2] at about 5:00 p.m., defendant Venegas walked into Tom's Market, a convenience store on East 6th Street in Los Angeles. Venegas went to a cooler and got a 12-pack of beer. Maniul Huq, the store clerk, testified

---

[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] All further calendar references are to the year 2007 unless otherwise specified.

Venegas came up to the counter, put the beer down and continued browsing. After the only other customer left the store, Venegas returned to the front counter and said, "Give me the money, give me the money." Venegas then started to come around the counter toward Huq. Very frightened, Huq jumped over the counter and ran outside. Huq then saw Venegas leave the store with the beer, get into a van and say, "Hurry up, let's go." The van drove off.

At about 6:30 p.m. that same day, Hector Marrero saw a van packed across the street from his house. Venegas was in the driver's seat, another man was in the passenger seat, and there was a woman in the back. Marrero happened to be on the phone with Officer Randy Hasnas when the van caught his attention. Venegas was drinking beer and snorting something Marrero assumed was an illegal drug. Then the people in the van started arguing. Venegas grabbed a gun and beat the woman with it. Marrero could hear the woman scream. The gun looked like a nine millimeter.

Moments later, Officer Hasnas and his partner, Rene Perez, arrived. The officers approached the van on foot, one on each side. Hasnas testified that when he shone a flashlight on the passenger door he saw a gun pointed in his direction. Hasnas wasn't sure who was holding the gun. He fired a shot toward the gun. When Perez heard the shot, he ran up to the driver's side window and saw Venegas "in the driver's seat . . . , his attention was to the right, his upper body was twisted, and his arm was pointed over to where my partner should be (indicating)." Perez punched Venegas in the head. Venegas started the engine and began driving. Hasnas fired a second shot at the van. Marrero testified he saw Venegas fire a shot before driving off, but neither officer confirmed that testimony.

The officers got into their vehicle and chased the van. After several blocks, Venegas pulled over, got out and ran across the street. Perez could see that Venegas was holding a black semiautomatic handgun. Venegas pointed the gun at the officers, aiming it under his armpit as he ran. Perez fired a shot at Venegas.

Venegas ran down a driveway and the officers lost sight of him. They called in more police units to set up a perimeter. Venegas was apprehended about four hours later. The gun was never found.

2. *Defendant evidence.*

Venegas testified he had been using drugs that day. He and two friends were smoking crack cocaine and snorting crystal methamphetamine. Venegas testified he went into Tom's Market to get some beer. He didn't have any money to pay for it, so he just picked up a 12-pack and walked out. He denied ordering the store clerk to give him money. As Venegas passed by the counter on his way to the door, the clerk suddenly jumped over the counter and ran out the door ahead of Venegas.

Venegas testified he did not have a gun that day. He also denied hitting the woman in the back of the van. When he became aware a police car had pulled up behind the van, he drove off because he knew he had violated his parole by stealing the beer and using drugs. As he drove off, the officers shot at him. Venegas drove around the corner, got out of the van and started running because he feared for his life. He hid under a car, where a police dog eventually discovered him.

CONTENTION

The trial court did not adequately instruct the jury on how to continue its deliberations after a juror was replaced by an alternate.

DISCUSSION

Venegas contends his convictions must be reversed because the trial court failed to explicitly instruct the jury that, to accommodate the alternate juror, it had to set aside all prior deliberations and start anew. This claim is meritless.

1. *Background.*

The jury deliberated on October 18 for about 2 hours and 20 minutes. On October 19, the jury deliberated from 9:30 a.m. until noon. After lunch, the

trial court replaced one of the jurors with an alternate[3] and then gave the jury this instruction: "Now that . . . the alternate has replaced Juror number 10, I'm going to advise you that you now have an obligation to begin your deliberations anew, in other words, begin your discussions anew with this alternate. [¶] Obviously, she hasn't been privy to your discussions in the jury room. Now that she is part of the jury, you will have to begin your deliberations anew, and she'll have to take part in the discussions and so forth and review of the evidence."

Venegas did not object to the trial court's instruction.[4]

The jury resumed deliberating at 1:40 p.m. and stopped at 3:48 p.m. On the following Monday, October 22, deliberations began at 9:15 a.m. From 9:20 until 10:03 a.m., the jury heard readback of testimony. At 11:40 a.m., the jury reached a verdict.

2. *Discussion*.

a. *Jury was adequately instructed.*

People v. Collins (1976) 17 Cal.3d 687, disapproved on another ground in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19, discussed the type of instruction required when a trial court substitutes an alternate juror for a regular juror after deliberations have already begun: "[A] proper construction of section 1089 [substitution of alternate for regular juror] requires that deliberations begin anew when a substitution is made after final submission to the jury. This will insure that each of the 12 jurors reaching the verdict has fully participated in the

---

[3] Juror No. 10 was removed after informing the trial court that, during voir dire, she failed to mention her sister had been the victim of domestic violence, and then she found herself getting upset when she learned Venegas had previously been convicted of the same crime.

[4] The Attorney General argues the failure to object to this instruction at trial waives the issue on appeal. However, Venegas has filed an accompanying petition for writ of habeas corpus alleging defense counsel was ineffective for not objecting, thus raising the issue here.

deliberations, just as each had observed and heard all proceedings in the case. *We accordingly construe section 1089 to provide that the court instruct the jury to set aside and disregard all past deliberations and begin deliberating anew*. The jury should be further advised that one of its members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations again from the beginning; and that each remaining original juror must set aside and disregard the earlier deliberations as if they had not been had."[5] (*Id*. at p. 694, italics added.)

Venegas asserts the instruction given in his case was flawed because it failed to expressly advise the jurors to *both* set aside their past deliberations *and* begin deliberating all over again. Citing *People v. Martinez* (1984) 159 Cal.App.3d 661, 664, Venegas argues: "This admonition, like the one in *Martinez*, did not make clear that the jury was to disregard its prior deliberation. In fact, the court's gloss on the meaning of 'beginning anew' – 'in other words, begin your deliberations anew with this alternate' and allow her 'to take part in the discussion and so forth' – might well have suggested to the jury that deliberating with the alternate rather than Juror No. 10 was all that was meant by the term."

---

[5] This language became the basis for CALJIC No. 17.51: "Members of the Jury: [¶] A juror has been replaced by an alternate juror. You must not consider this fact for any purpose. [¶] The People and [the] defendant[s] have the right to a verdict reached only after full participation of the twelve jurors who return the verdict. [¶] This right may be assured only if you begin your deliberations again from the beginning. [¶] You must therefore set aside and disregard all past deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place. [¶] You shall now retire to begin anew your deliberations in accordance with all the instructions previously given."

We are not persuaded. The trial court in *Martinez* had instructed the jury: " 'Now that there is a new member of the jury, the jury will resume their deliberations starting over with the new trial juror. . . .' " (*People v. Martinez, supra*, 159 Cal.App.3d at p. 664.) The Court of Appeal reasoned: "The trial court's mandate clearly instructed them to 'start over' with the new juror, but they were not instructed to set aside and disregard all past deliberations. This was a crucial error." (*Id*. at p. 665.) But after *Martinez* was decided, our Supreme Court held that a valid instruction in this situation need not explicitly direct the jurors to disregard their previous deliberations. In *People v. Proctor* (1992) 4 Cal.4th 499, "the trial judge advised the jury to resume its deliberations, stating it 'would be helpful and in connection with commencing your deliberations again, that you kind of start, start from scratch, so to speak, so that Mr. Rhoades [the alternate] has the benefit of your thinking as well as give him an opportunity for his input also.' " (*Id*. at p. 536.) In reply to the defendant's claim this instruction was erroneous because it did not include all the elements required by *Collins*, the *Proctor* court held: "Defendant's contention must be rejected. By instructing the jury to 'kind of start, start from scratch, so to speak,' the court *implied* that the jury should disregard its previous deliberations. [Citation.] By providing this directive in the context of advising the jurors to give the alternate the benefit of the other jurors' thoughts, as well as to give the jurors the benefit of the alternate's input, the court further emphasized that deliberations were to begin anew with the full participation of the alternate." (*Id*. at p. 537, italics added.)

Here, the trial court ordered the reconstituted jury to "begin your discussions anew with this alternate," explaining: "Obviously, she hasn't been privy to your discussions in the jury room. Now that she is part of the jury, you will have to begin your deliberations anew, and she'll have to take part in the discussions and so forth and review of the evidence." This instruction, like the one in *Proctor*, implied that the remaining original jurors were to disregard their prior deliberations. As such, the instruction was not erroneous.

Venegas argues there were unique circumstances here which rendered the jury instruction inadequate: "As is apparent from the record, both the page [of the jury instructions] containing the text of CALJIC No. 9.40 on robbery and the page containing the text of CALJIC No. 9.20 on assault with a deadly weapon on a peace officer were marked by jurors during deliberations in a manner that suggested appellant was guilty. The page containing the text of CALJIC No. 9.40 was marked with a 'Y' next to each element of that offense, presumably indicating that the jury voted 'yes' on the proposition that the particular elements had been proved. The page containing the text of CALJIC 9.20, however, was marked with 2 'Y' characters next to each element. [¶] It is impossible to know, of course, whether these 'Y' characters were added during the four hours and fifty minutes of deliberations with a biased juror or if they were added afterward. However, the presence of these characters . . . underscore [*sic*] the risk that the nearly five hours of biased deliberation were not disregarded by the jury as it was finally constituted. In particular, the second set of 'Y' characters raise the concern that the alternate juror may have been asked to add her own 'Y' next to the already documented vote of the other jurors, or that she was shown jury instructions already marked with multiple sets of 'Y' notations next to each element."

However, we agree with the Attorney General's position that the "Y" marks on the jury instructions are ambiguous and that Venegas's theory is, therefore, too speculative. We cannot tell when those marks were made, who made them, or what they were meant to signify.

In sum, we conclude the trial court's instruction to the reconstituted jury was not erroneous.

b. *Any error would have been harmless*.

But even assuming, arguendo, the instruction was erroneous under *Collins*, we would still affirm Venegas's convictions because it is plain the error would not have caused him any prejudice. (See *People v. Collins*, *supra*, 17 Cal.3d at p. 697 [failure to instruct jury on how to continue deliberations with alternate was harmless error under *Watson*[6] because "no reasonable probability that a more favorable verdict would have been returned had the jury been properly instructed following the substitution"].)

"In determining whether *Collins* error was prejudicial, we may consider whether the case is a close one and compare the time the jury spent deliberating before and after the substitution of the alternate juror. [Citations.] In *People v. Odle* [1988] 45 Cal.3d 386, we concluded there was no prejudice where the case against the defendant was overwhelming and where the jury deliberated only part of one afternoon prior to substitution of the alternate juror and two and one-half days thereafter. [Citation.] In *People v. Collins*, *supra*, 17 Cal.3d 687, itself, we determined the error was not prejudicial where the case against the defendant was very strong, and the jury had deliberated little more than one hour prior to substitution of the alternate and had returned a verdict after several additional hours. [Citation.] [¶] In the present case, the evidence against defendant was extremely strong. The jury had deliberated less than one hour prior to substitution of the alternate, and continued to deliberate for two and one-half days thereafter. It is not reasonably probable the outcome of the trial would have been different had the jury been instructed, in more exact language, to begin its deliberations anew." (*People v. Proctor*, *supra*, 4 Cal.4th at pp. 537-538.)

The Attorney General argues that, like the situations discussed in *Proctor*, the evidence against Venegas was very strong: "The only real issue in dispute was

---

[6] *People v. Watson* (1956) 46 Cal.2d 818, 836.

whether appellant had a gun during his encounter with police.[7] Three eyewitnesses, including two police officers, testified that they saw appellant with a gun at two different times that evening [whereas] . . . [t]he only suggestion that appellant did not have a gun was his own. He testified that he did not have a gun at any point during the day." The Attorney General argues there was no reason for the officers to have shot at Venegas if he had not been armed. The Attorney General also points out that, not only did the jury deliberate for about the same amount of time both before and after the substitution, but "[a]fter the alternate was substituted in, the jury asked for a readback of testimony. Critically, the testimony requested pertained to the central issue in dispute – whether appellant had a gun. This indicates that the jury had not already decided this issue when the alternate was substituted in, and that the jury did deliberate the issue anew with the alternate."

Venegas complains the Attorney General has "present[ed] an entire prejudice analysis without addressing – or even directly stating – the most salient fact to be considered in that assessment, which is simply that no gun was found in this case. It was a case with a gun use allegation and no gun." But Venegas himself is leaving out the very significant fact that, following the last time he pointed the gun at the officers, he fled on foot and was not apprehended until *four hours later*. Although Venegas testified he spent that entire time hiding under a car, thus implying he had no opportunity to hide a gun, there is almost no chance the jury believed his story. For, as the Attorney General notes, Venegas's testimony on other critical issues was so incredible the jury chose to disbelieve him. For instance, Venegas testified that when he stole the beer from

---

[7] Venegas agrees this was the crucial issue: "The time spent in deliberation and the focus on the issue of the gun reflected the most significant evidentiary hurdle faced by the prosecution: it was arguing for a conviction on the gun enhancement without producing the gun itself or claiming that appellant ever fired a gun.'

Tom's Market, he did not demand money from the store clerk. According to Venegas, "the clerk jumped the counter and ran out of the store for no reason whatsoever." Clearly the jury believed Venegas was lying.

We conclude that even if the jury instruction had been erroneous, there would have been no resulting prejudice to Venegas.

DISPOSITION

The judgment is affirmed and the petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.